IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 200 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
SIDRAL FOOD PVT LTD. - Respondent(s)

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Appearance :
MR TANVISH U.BHATT FOR MR BB NAIK for Applicant(s) : 1,
NOTICE SERVED for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 13/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench 'A' has referred the following question under Section 256(1) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income Tax.

> *"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessee is entitled to grant of investment allowance in respect of plant and machinery installed and put to use in the year under consideration for the manufacture of various products like breads, biscuits and cakes?"*

2 The Assessment Year is 1988-89 and the relevant accounting period is year ended on 31/5/1987. The assessee claimed investment allowance of Rs.1,30,037/-. However, the Assessing Officer disallowed the same holding that running a bakery and preparation of food articles does not constitute manufacture or production. He also recorded that the statutory reserve had not been created by the assessee. The assessee carried the matter in appeal before CIT (Appeals), who vide order dated 20/11/1989 confirmed the assessment order on the limited ground of non creation of statutory reserve in the year under consideration.

3 The assessee carried the matter in appeal before the Tribunal who allowed the claim of the assesee. It has been found by the Tribunal that the assessee is running a semi automatic plant for the manufacture of various types of breads,

biscuits and cakes. That it has employed about 25 workers in the manufacturing process. That plant and machinery worth Rs.5,20,291/- have been installed and put to use from 23/08/1986. It is further found by the Tribunal that it is an undisputed fact that the raw materials such as flour, ghee, sugar are used in the process of manufacturing or production of articles like breads, biscuits and cakes. The said items are produced by employing a mechanical device in the form of sophisticated semi automatic plant. That the product so obtained is a different commercial commodity as compared to raw materials used in the process of producing the finished products. That all other conditions required for grant of investment allowance u/s.32A of the Act stand satisfied.

4 In relation to creation of reserve it has been found by the Tribunal that the statutory

reserve has been created in the immediately succeeding year viz. Assessment Year 1989-90 which amounts to sufficient compliance of the relevant provisions and the clarification issued by the Central Board of Direct Taxes in Circular No. 259 dated 11/07/1979 read with Circular No.305 dated 12/06/1981, as well as amendment to Section 32A(4)(ii) of the Act by Finance Act,1990 with retrospective effect from 01/04/1976. The Tribunal therefore granted investment allowance to the assessee.

5 Mr.T.U.Bhatt on behalf of Mr.B.B.Naik, learned Standing Counsel for the applicant-revenue submitted that whether the assessee is carrying on business of manufacturing or producing articles or things has to be considered for the purpose of deciding whether the assessee is entitled to investment allowance. He submitted that an assessee who is carrying on trading

business cannot be termed to be an assessee fulfilling the condition necessary for grant of investment allowance. According to him raw materials were edible items which remained so after processing by the assessee and hence it did not fulfill the relevant test laid down by the Apex Court in the case of *The Deputy Commissioner, Sales Tax Vs. M/s.Pio Food Packers, AIR 1980 SC 1227.* He, therefore, urged that the order of the Tribunal was erroneous and the reference be answered in favour of the revenue.

6 Though served, there is no appearance on behalf of the respondent assessee.

7 It is an accepted fact that for the year under consideration, the assessee had filed the return of loss and even after various disallowance the assessment has resulted into total loss of Rs.4,77,782/-. In this connection,

non creation of reserve cannot be treated as ground for disallowance of claim of investment allowance if the assessee is able to establish that in the year of profit it has created statutory reserve. In the present case, it has been found as a matter of fact, by the Tribunal that in Assessment Year 1989-90 the assessee has created statutory reserve and hence the said ground for rejecting the claim of investment allowance would not survive. The Assessing Officer himself has recorded that the assessee company has been incorporated with effect from 1/3/1985 under the Companies Act,1965 and carries on business as bakers of bread, biscuits and cakes under the name and style of Busy Bakers at Baroda. That the business has commenced from 23/8/1986. Therefore, it is an undisputed fact that the assessee is not a trader. The only question that survives thereafter is as to whether it can be stated that the assessee has

satisfied the condition of Section 32A(1) read with Section 32(2)(b)(ii) of the Act. It has been found by the Tribunal that all other conditions prescribed by this Section are satisfied and the only dispute between the parties is as to whether the assessee is carrying on business of manufacture or production of an article or thing specified in the list in the Eleventh Schedule.

8 In the case of *Deputy Commissioner, Sales Tax Vs. M/s.Pio Food Packers* (supra) the following tests have been formulated by the Apex Court :

> *"The goods purchased should be consumed, the consumption should be in the process of manufacture, and the result must be the manufacture of other goods. There are several criteria for determining whether a commodity is consumed in the manufacture of another. The generally*

prevalent test is whether the article produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. Commonly manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture

can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity".

9 Applying the aforesaid tests which are positive and negative in character, can it be stated that the activity which is carried on by the assessee is such that the raw material which undergoes a process retains its original identity? The assessee uses flour, ghee, sugar etc. to prepare produce breads, biscuits and cakes etc. The end product which is obtained after the raw materials are processed/consumed is an article which is regarded in the trade, by

those who deal in it, as being distinct in identity from the commodity involved in its manufacture. In other words, the produced goods are never known or sold to the customer/consumer as flour, ghee or sugar. The nature and extent of the processing is of such magnitude that the change which occurs results in different commodity commercially and is recognised as a new and distinct article. The inputs can no longer be identified as such and the produced article or thing has essentially a different identity vis-a-vis inputs. These are the findings recorded by the Tribunal and in the circumstances, it is not possible to state that the Tribunal has committed any error.

10 The question is answered in the affirmative i.e. in favour of the assessee and against the revenue.

11 The Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-
(D.A.Mehta, J) (H.N.Devani, J)

m.m.bhatt